FILE COPY

Office - Supreme Court, U. S.
FILED
JUL 22 1940
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 265

WILLIAM D. VAN DYKE, JR., AND DOUGLASS VAN DYKE, AS TRUSTEES UNDER TRUST AGREEMENT DATED DECEMBER 6, 1935,

Appellants,

vs.

WISCONSIN TAX COMMISSION, JOHN H. LEENHOUTS, ASSESSOR OF INCOMES OF MILWAUKEE COUNTY, WISCONSIN, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

JOHN E. MARTIN,
Attorney General of Wisconsin;
HAROLD H. PERSONS,
Assistant Attorney General of Wisconsin,
Counsel for Appellees.

INDEX.

Subject Index.

	Page
Statement opposing jurisdiction	1
Nature of the case	1
Statutes involved	2
Statement of facts	4
No substantial Federal question is presented	8
Sole question presented is one of State jurisdiction to tax	8
The decision below is in accord with decisions of this Court and so clearly right as not to be a proper subject of review	10
Motion to dismiss or affirm	17

Table of Cases Cited.

Blodgett v. *Silberman*, 277 U. S. 1, 72 L. Ed. 749, 48 Sup. Ct. 410	12
Boardman, In re, 169 U. S. 39, 42 L. Ed. 653, 18 Sup. Ct. 291	15
Bromley v. *McCaughn*, 280 U. S. 124, 74 L. Ed. 226, 50 Sup. Ct. 46	11
Bullen v. *Wisc.*, 240 U. S. 625, 60 L. Ed. 830, 36 Sup. Ct. 473	12
Burnett v. *Guggenheim*, 288 U. S. 280, 77 L. Ed. 748, 53 Sup. Ct. 369	11
Curry v. *McCanless*, 307 U. S. 357, 83 L. Ed. 1339, 50 Sup. Ct. 900	12, 13, 14
Estate of Charles Henry Sanford v. *Commr.*, 308 U. S. 39, 84 L. Ed. 53, 60 Sup. Ct. 51	11
First National Bank v. *Maine*, 284 U. S. 312, 76 L. Ed. 315, 52 Sup. Ct. 174	12
Frick v. *Pa.*, 268 U. S. 473, 69 L. Ed. 1058, 45 Sup. Ct. 603	15
Heiner v. *Donnan*, 285 U. S. 312, 76 L. Ed. 772, 52 Sup. Ct. 358	14
Helvering v. *Hallock*, 309 U. S. 106, 84 L. Ed. 382, 60 Sup. Ct. 444	14

Page

Keeney v. *N. Y.*, 222 U. S. 525, 56 L. Ed. 299, 32 Sup. Ct. 105 12
McGoldrick v. *Berwind-White Coal Mining Co.*, 309 U. S. 33, 84 L. Ed. 343, 60 Sup. Ct. 388 14
Manhattan L. Ins. Co. v. *Cohen*, 234 U. S. 123, 58 L. Ed. 1245, 34 Sup. Ct. 874 11
Michigan v. *Michigan Trust Co.*, 286 U. S. 334, 76 L. Ed. 1136, 52 Sup. Ct. 512 9
Newark Fire Ins. Co. v. *State Board*, 307 U. S. 313, 83 L. Ed. 1312 59 Sup. Ct. 918 15
Pearson v. *McGraw*, 308 U. S. 313, 84 L. Ed. 139, 60 Sup. Ct. 211 12
Quong Ham Wah Co. v. *Ind. Accid. Com'n of Calif.*, 255 U. S. 445, 65 L. Ed. 723, 41 Sup. Ct. 373 9
So. Pac. v. *Ky.*, 222 U. S. 63, 56 L. Ed. 110, 32 Sup. Ct. 27 15
Spies, In re, 123 U. S. 131, 31 L. Ed. 80, 8 Sup. Ct. 22 15
Tampa Waterworks Co. v. *Tampa*, 199 U. S. 241, 50 L. Ed. 170, 26 Sup. Ct. 23 9
Untemeyer v. *Anderson*, 276 U. S. 440, 72 L. Ed. 645, 48 Sup. Ct. 353 11
Utley v. *St. Petersburg*, 292 U. S. 106, 78 L. Ed. 1155, 54 Sup. Ct. 593 11
Vilas v. *Iowa State Board of Assessment and Review*, 302 U. S. 637, 82 L. Ed. 496, 58 Sup. Ct. 38 10
Zucht v. *King*, 260 U. S. 174, 67 L. Ed. 194, 43 Sup. Ct. 24 10

STATUTES CITED.

Constitution of the United States, 14th Amendment 9
Laws of Wisconsin of 1933, Chapter 363, Section 4, as amended by Chapter 15 of the Laws of Wisconsin 1935 2
Treasury Department Circular No. 535, issued April 22, 1935 4
Wisconsin Constitution, Article VIII, Section 1 2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 265

WILLIAM D. VAN DYKE, JR., AND DOUGLASS VAN DYKE, AS TRUSTEES UNDER TRUST AGREEMENT DATED DECEMBER 6, 1925,

Appellants,

vs.

WISCONSIN TAX COMMISSION; JOHN H. LEENHOUTS, ASSESSOR OF INCOMES OF MILWAUKEE COUNTY; STATE OF WISCONSIN; WISCONSIN DEPARTMENT OF TAXATION; AND ELMER E. BARLOW, AS COMMISSIONER OF TAXATION OF THE STATE OF WISCONSIN,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

APPELLEES' STATEMENT OPPOSING APPELLATE JURISDICTION.

Pursuant to paragraph 3 of Rule 12 of the Rules of the United States Supreme Court appellees file this statement opposing appellate jurisdiction.

Nature of the Case.

This appeal is from a judgment of the Supreme Court of the State of Wisconsin, affirming an assessment of gift

taxes, imposed by the statutes of Wisconsin, against the appellants. Said judgment was entered June 4, 1940, in proceedings in the courts of the State of Wisconsin to review an order and decision of the Wisconsin Tax Commission which affirmed said assessment. The taxes involved were assessed pursuant to the provisions of Section 4 of Chapter 363, Laws of Wisconsin 1933, as amended by Chapter 15 of the Laws of Wisconsin 1935, upon a gift in trust to the appellants on December 6, 1935. The controversy arises over the liability of the appellants to a tax on said gift under said tax law. Appellants claim that they are not liable for the tax because of their contention that the transfer by gift, upon which the assessment was made, was beyond the taxing jurisdiction of the State of Wisconsin. At the time the gift was made the donor, the donees and the trustees of the gift in trust were all residents of the State of Wisconsin.

Statutes Involved.

Article VIII, Section 1 of the Wisconsin Constitution so far as here material, provides:

> Section 1. "• • • Taxes may also be imposed on incomes, privileges and occupations, which taxes may be graduated and progressive, and reasonable exemptions may be provided."

The Wisconsin Emergency Gift Tax Law, under which the tax here involved was assessed, was enacted by Section 4 of Chapter 363, Laws of Wisconsin 1933, and amended by Chapter 15 of the Laws of Wisconsin 1935. The pertinent provisions of said law, as so amended, are as follows:

> "Section 4. Emergency Gift Tax. (1) An emergency tax is imposed upon transfers of property, real, personal or mixed, or any interests therein or income therefrom, in trust or otherwise, to any person, asso-

ciation or corporation, which are made subsequent to the effective date of this act and prior to July 1, 1937, in the following cases, except as hereinafter provided.

"(a) When the transfer is by gift from any person who at the date of such gift was a resident of the state.

"(b) When the transfer is by gift of property within the state or within its jurisdiction and the donor was a nonresident of the state at the date of such gift.

"(c) No tax shall be imposed upon the transfer of any property which is taxable under the inheritance tax law of this state, and any tax paid upon the transfer of any property under the provisions of this section may be applied as a credit upon any inheritance tax which may be imposed under the inheritance tax law upon the same transfer, and no tax shall be imposed upon any tangible personal property of a resident donor when such property is located without this state; provided, however, such property is not without this state temporarily.

"(2) (a) If the transfer is made in property, the clear market value thereof at the date of the gift shall be considered the taxable value of the gift. Where property is sold or exchanged for less than a fair consideration in money or money's worth, then the amount by which the clear market value of the property exceeded the consideration received shall, for the purposes of the tax imposed by this chapter, be deemed a gift and shall be included in computing the amount of gifts made during the year.

"(b) All transfers to the same donee by the same donor within the same calendar year shall be added together and the aggregate of such transfers shall be considered as one transfer for the purposes of taxation under this chapter, and the rates of tax hereinafter prescribed shall be applied to the aggregate of such transfers made within the same calendar year.

"* * *"

The remaining provisions of said section, specifying the rates of tax, exemptions, and methods of assessment and collection, are not here material.

Statement of Facts.

George D. Van Dyke, at the time of the gift here involved, was an attorney at law of the age of 82, and was and had been all his lifetime a resident of the city of Milwaukee, State of Wisconsin. He owned $270,000 of First Liberty Loan Bonds, which were called for redemption as of June 15, 1935. In the Rules and Regulations promulgated by the Secretary of the Treasury for the redemption of these bonds (Department Circular No. 535, issued April 22, 1935) it was required that said bonds be presented and surrendered to any federal reserve bank or branch, or to the Treasury Department at Washington, D. C., and that incorporated banks and trust companies were not agents of the United States for the purposes of such redemption. The federal reserve bank nearest to Milwaukee, Wisconsin was the federal reserve bank at Chicago, Illinois. Having ascertained that said bonds would not be redeemed in gold but that he could collect the same in silver dollars, George D. Van Dyke went to Chicago on November 22, 1935, taking with him $270,000.00 par value of said bonds and appointed the First National Bank of Chicago, Illinois his agent to surrender said bonds to the Federal Reserve Bank at Chicago for payment in silver dollars. As the Federal Reserve Bank at Chicago, however, did not then have on hand sufficient silver dollars, he returned to Milwaukee, Wisconsin.

Upon being informed that the requisite number of silver dollars had been shipped from Washington, D. C. to and received by the Federal Reserve Bank at Chicago, George D. Van Dyke, accompanied by his son Douglass Van Dyke,

on December 6, 1935, went to Chicago and met George B. Luhman, President of the First Wisconsin Trust Company of Milwaukee, Wisconsin, at the offices of the First National Bank of Chicago. Previous thereto two written trust instruments had been prepared.

By one of said trust agreements said George D. Van Dyke transferred $135,000.00 in silver dollars of the United States to his sons Douglass Van Dyke and William D. Van Dyke, Jr., as a gift in trust for the benefit of Louise Lawrence Van Dyke of Milwaukee, Wisconsin, a granddaughter of said George D. Van Dyke and daughter of said Douglass Van Dyke. By the other trust agreement said George D. Van Dyke transferred $135,000.00 in silver dollars of the United States to the First Wisconsin Trust Company of Milwaukee, Wisconsin as a gift in trust for Louise Van Dyke Hauxhurst of Milwaukee, Wisconsin, a daughter of said George D. Van Dyke.

Both of said trust agreements were signed by the donor, George D. Van Dyke, at Chicago, Illinois on said December 6, 1935. The first mentioned trust agreement was likewise at the same time signed by Douglass Van Dyke, as one of the trustees, but it had been previously signed by his brother and co-trustee, William D. Van Dyke, Jr., at Milwaukee, Wisconsin. The second trust agreement was signed on behalf of the First Wisconsin Trust Company of Milwaukee, Wisconsin, as trustee, by George Luhman its president, at Chicago, at the same time as it was signed by George D. Van Dyke, the donor, on said December 6, 1935.

Then George D. Van Dyke, Douglass Van Dyke and George B. Luhman went to the Federal Reserve Bank of Chicago, where the silver dollars were in the private vaults of the First National Bank of Chicago in said Federal Reserve Bank. They were admitted to said vaults, accompanied by a representative of the First National Bank of Chicago and a representative of the Federal Reserve Bank

and the 270,000 silver dollars stored in bags in vaults sealed in the name of the First National Bank of Chicago were delivered to George D. Van Dyke and he receipted therefor. Thereupon he delivered 135,000 of said silver dollars to Douglass Van Dyke as trustee under the first trust agreement who thereupon gave him a receipt therefor by himself and his brother, William D. Van Dyke, Jr. as trustees under the first trust instrument, he having a power of attorney to act for his said brother. George D. Van Dyke at the same time also delivered the other 135,000 silver dollars to George B. Luhman, as President of the First Wisconsin Trust Company of Milwaukee, Wisconsin, who receipted for the same on behalf of said First Wisconsin Trust Company, Milwaukee, as trustee under the second trust instrument.

On the same day, December 6, 1935, that the 135,000 silver dollars were so received, Douglass Van Dyke delivered them to the First National Bank of Chicago, with the request that it open an account in the name of Douglass Van Dyke and William D. Van Dyke, Jr., trustees. That amount remained there untouched until about two days after Christmas, at which time they bought a $10,000 par United States Savings Bond for $7,500.00. They completed the investment of said funds about the middle of April, 1936, at which time they had used up the balance in the Chicago bank and opened an account in the Marine National Exchange Bank of Milwaukee, Wisconsin, by transferring three or four thousand dollars of the said amount thereto.

The First Wisconsin Trust Company, acting through George B. Luhman, its president, on the same day delivered the 135,000 silver dollars it so received to the First National Bank of Chicago, and the said amount, at its request, was immediately credited to the account of the First Wisconsin National Bank of Milwaukee, which bank thereupon credited the account of the First Wisconsin Trust Company.

George D. Van Dyke, the donor, Douglass Van Dyke and William D. Van Dyke, Jr., trustees under the first trust instrument, Louise Lawrence Van Dyke, the principal beneficiary under the first trust instrument, and Louise Van Dyke Hauxhurst, the principal beneficiary under the other trust instrument, are *all* residents of Milwaukee, Wisconsin, and the First Wisconsin Trust Company, trustee of the other trust, is a corporation organized under the laws of the State of Wisconsin and is located at Milwaukee, Wisconsin.

In collecting said bonds and silver dollars, George D. Van Dyke, the donor, never had any intention of bringing the silver dollars to Wisconsin, and said silver dollars, which weighed approximately 7½ tons, had never been in the State of Wisconsin. There was no attempt at secrecy or evasion in the transaction, and the trust instruments expressly provided that full disclosure should be made to the taxing authorities of the State of Wisconsin.

The trustees under each of said trust instruments made donees' returns to the proper taxing officers of Wisconsin, but claiming therein that said gifts were not subject to the Wisconsin gift tax. The assessor of incomes notified them, pursuant to provisions of the Wisconsin statutes, that such gifts in trust were subject to a tax under the gift tax law of Wisconsin, and that the taxes thereon would be certified for collection unless they protested the same in the manner provided by the applicable Wisconsin statutes. The trustees duly protested and as the same facts and identical questions of law were applicable to the taxes on both gifts, the matters were heard together by the Board of Review, at which hearing the testimony and evidence were introduced. The Board of Review affirmed the assessment of gift taxes upon both gifts, and upon appeals by the trustees, the matters were reviewed by the Wisconsin Tax Commission upon the record made before the Board of Review, and

on November 30, 1938, it entered orders affirming the assessment of gift taxes in each case. All of the foregoing procedure was in accordance with and pursuant to applicable provisions of the Wisconsin statutes.

From such orders of the Wisconsin Tax Commission the trustees of the respective trusts took separate appeals, pursuant to the Wisconsin statutes, to the Circuit Court of Milwaukee County, Wisconsin, which on December 15, 1939, entered a judgment in each case affirming and sustaining the order of the Wisconsin Tax Commission. Thereupon the trustees appealed separately to the Wisconsin Supreme Court, which, pursuant to stipulation of the parties and order of the court, heard the cases together and affirmed the judgments of the Circuit Court, but entered separate judgments to that effect in each appeal on June 4, 1940.

The instant appeal is from the said judgment of the Supreme Court of Wisconsin which sustained the tax on the gift in trust to Douglass Van Dyke and William D. Van Dyke, Jr., as trustees under the first mentioned trust agreement. A companion appeal has also been taken to this Court by the First Wisconsin Trust Company of Milwaukee from the judgment sustaining the tax on the other gift in trust. The same set of facts are involved and identical questions of law are raised and presented in both cases.

No Substantial Federal Question is Presented.

1. Sole Question Presented is One of State Jurisdiction to Tax.

The Supreme Court of Wisconsin in its decision rendered June 4, 1940 (not yet reported but which is contained in the record herein), construed the Emergency Gift Tax Law of Wisconsin as applicable to and imposing a tax upon the gift in trust here involved, and held that as so construed and applied such taxing act was valid and constitutional as

against the claim of appellants that the imposition of such tax violated the due process clause of the Fourteenth Amendment. The decision of the Supreme Court of Wisconsin so construing the statute is binding upon and must be accepted by the Supreme Court of the United States in testing the validity thereof under the Constitution of the United States.

Michigan v. *Michigan Trust Co.* (1932), 286 U. S. 334, 76 L. Ed. 1136, 52 Sup. Ct. 512;

Quong Ham Wah Co. v. *Ind. Accid. Com'n of Calif.* (1921) 255 U. S. 445, 65 L. Ed. 723, 41 Sup. Ct. 373;

Tampa Waterworks Co. v. *Tampa* (1905), 199 U. S. 241, 50 L. Ed. 170, 26 Sup. Ct. 23.

Thus, the only question of a Federal character that could be presented by this appeal is the constitutionality of the Emergency Gift Tax Law of Wisconsin in imposing a tax upon the gift here involved.

The appellants claim as a basis for appellate jurisdiction and assign as error that the decision of the Supreme Court of Wisconsin is erroneous in holding:

(1) That the gift in trust concluded by the delivery of the silver dollars in the State of Illinois, by a resident of the State of Wisconsin to trustees, residents of Wisconsin, in trust for residents of Wisconsin is taxable under the Wisconsin gift tax law, because the State of Wisconsin lacked jurisdiction to tax such gift and therefore the decision of the said court in favor of the validity of said statute, construed as imposing a tax on said gift, deprives appellants of property without due process of law in violation of Section 1 of the XIVth Amendment to the Constitution of the United States.

(2) That the silver dollars had acquired a constructive taxable situs at the domicile of the donor at the time of the delivery thereof.

(3) That the gift was in substance a transfer of intangibles having a constructive taxable situs at the domicile of the donor.

(4) That jurisdiction of Wisconsin to tax the actual transfer of silver dollars in Illinois, could be predicated upon a constructive situs at the domicile of the donor of the property transferred, whether deemed tangible or intangible.

Thus the sole question raised on this appeal is whether the gift in question is within the taxing jurisdiction of the State of Wisconsin.

It is appellees' contention that this presents no substantial Federal question because the decision of the Supreme Court of Wisconsin that said gift is within the jurisdiction of the State of Wisconsin to impose taxes is not contrary to any decision of the Supreme Court of the United States, but on the contrary is in accord therewith and is so clearly right as to not be a proper subject of review.

The Supreme Court of the United States will decline jurisdiction, although the constitutionality of a State law is drawn in question, where it appears that the constitutional question is not substantial in character.

Vilas v. *Iowa State Board of Assessment and Review* (1937), 302 U. S. 637, 82 L. Ed. 496, 58 Sup. Ct. 38;

Zucht v. *King* (1922), 260 U. S. 174, 176, 67 L. Ed. 194, 198, 43 Sup. Ct. 24.

2. The Decision Below is in Accord With Decisions of This Court and so Clearly Right as Not to be a Proper Subject of Review.

No substantial Federal question is presented by a contention that constitutional rights have been violated, where

the question has been settled by prior decisions of the Supreme Court of the United States.

Utley v. *St. Petersburg* (1933), 292 U. S. 106, 78 L. Ed. 1155, 54 Sup. Ct. 593;

Manhattan L. Ins. Co. v. *Cohen* (1913), 234 U. S. 123, 58 L. Ed. 1245, 34 Sup. Ct. 874.

The purpose of gift taxes is to prevent or compensate for avoidance of death taxes by taxing gifts *inter vivos* of property, which but for the gifts *inter vivos*, would be subject in its original or converted form to taxes upon transfers at death. Thus, the gift tax is supplemental to the estate or inheritance tax; the two are in *pari materia* and must be construed together.

Estate of Charles Henry Sanford v. *Commr.* (1939), 308 U. S. 39, 84 L. Ed. (Adv. Sh.) 53, 60 Sup. Ct. (Adv. Sh.) 51;

Untemeyer v. *Anderson* (1928), 276 U. S. 440, 72 L. Ed. 645, 48 Sup. Ct. 353.

Therefore, statutes taxing transfers by gifts *inter vivos* are considered and read in the light of decisions of this Court relating to transfers in contemplation of or to take effect at death, and so far as the constitutional power to tax is concerned, there is no intelligible distinction between a tax upon the exercise of the power to give property *inter vivos* and the disposition of it by legacy.

Estate of Charles Henry Sanford v. *Commr.* (1939), 308 U. S. 39, 84 L. Ed. (Adv. Sh.) 53, 60 Sup. Ct. (Adv. Sh.) 51;

Burnett v. *Guggenheim* (1933), 288 U. S. 280, 77 L. Ed. 748, 53 Sup. Ct. 369;

Bromley v. *McCaughn* (1929), 280 U. S. 124, 74 L. Ed. 226, 50 Sup. Ct. 46.

The State of the owner's domicile may constitutionally impose a tax upon the transfer at death of tangible or intangible personal property which has not acquired an actual situs elsewhere, although the tangible personal property or the physical evidences of the intangible personal property may be outside of the domiciliary State, because such personal property has, for purposes of all taxation, a situs in law at the domicile of the owner thereof.

Curry v. *McCanless* (1939), 307 U. S. 357, 83 L. Ed. 1339, 50 Sup. Ct. 900;

First National Bk. v. *Maine* (1932), 284 U. S. 312, 76 L. Ed. 315, 52 S. Ct. 174;

Blodgett v. *Silberman* (1926), 277 U. S. 1, 72 L. Ed. 749, 48 S. Ct. 410.

The State of the owner's domicile may constitutionally impose a tax upon the transfer in contemplation of death of tangible or intangible personal property, which has not acquired an actual situs elsewhere, irrespective of where the tangible personal property or evidences of the intangible personal property may be.

Pearson v. *McGraw* (1939), 308 U. S. 313, 84 L. Ed. (Adv. Sh.) 139, 60 Sup. Ct. (Adv. Sh.) 211;

Bullen v. *Wis.* (1915), 240 U. S. 625, 60 L. Ed. 830, 36 Sup. Ct. 473;

Keeney v. *N. Y.* (1912), 222 U. S. 525, 56 L. Ed. 299, 32 Sup. Ct. 105.

The recent case of *Pearson* v. *McGraw* (1939), 308 U. S. 313, 84 L. Ed. (Adv. Sh.) 139, 60 Sup. Ct. (Adv. Sh.) 211 was followed by the Supreme Court of Wisconsin in rendering its decision and conclusively establishes that the gift here involved is within the taxing jurisdiction of Wisconsin.

In that case a decedent domiciled in Oregon owned intangibles which for many years were in possession of an

Illinois agent, who, at the decedent's direction, converted $450,000.00 of said intangibles into Federal reserve notes. The decedent executed an irrevocable trust agreement in Oregon pursuant to which the Federal reserve notes in Illinois were transferred to the said agent in trust for the benefit of certain designated persons. Five days thereafter the trustee converted the money into securities. After construing the various steps in the series which resulted in the transfer in trust as constituting but one integrated and indivisible transaction—a transfer by decedent of intangibles in contemplation of death—the court sustained an inheritance tax imposed by Oregon upon the transfer of the property in trust as a gift in contemplation of death on the authority of *Curry* v. *McCanless* (1939), 307 U. S. 357, 82 L. Ed. 1339, 50 Sup. Ct. 900. The court held that

> "constitutionally the property was 'within the jurisdiction of the state' of Oregon, since that jurisdiction is dependent not on the physical location of the property in the state, but on control over the owner."

Any difference in facts between *Pearson* v. *McGraw* and the instant case is without significance and does not in any way affect the force of the decision therein as controlling in this case. If anything that case was a *weaker* case upon which to sustain jurisdiction to tax than the instant case. In that case the transfer by gift was of Federal reserve notes, the proceeds of property that had been in Illinois for many years in the hands of the trustee, to an Illinois trustee with the intention that the trust property remain and be administered there—and it did in fact so remain. Here the gift was by a Wisconsin donor of silver dollars, the proceeds of the redemption of Liberty Loan bonds previously held by the donor at his domicil in Wisconsin, to Wisconsin trustees for Wisconsin beneficiaries, and the trust was to be and was administered in Wisconsin and the property comprising the trust *res* in fact was brought back to Wisconsin shortly thereafter.

Jurisdiction to tax intangibles or tangibles, which have not acquired a situs different than the domicile of the owner thereof, whether it be on the ownership, use or enjoyment thereof, is predicated upon the control over the owner thereof.

Curry v. *McCanless* (1939), 307 U. S. 357, 83 L. Ed. 1339, 50 Sup. Ct. 900.

Personal property, not having an actual *situs* elsewhere, has a situs at the domicile of the owner for the purpose of all taxation, including a tax upon the exercise of a constituent right therein, including the right to transfer. There is no distinction between a tax on property, the sum of all the rights and powers incident to ownership, and the taxation of the exercise of some of its constituent elements.

McGoldrick v. *Berwind-White Coal Mining Co.* (1940), 309 U. S. 33, 84 L. Ed. (Adv. Sh.) 343, 60 Sup. Ct. 388.

A transfer in contemplation of death like an ordinary gift *inter vivos* embodies a transaction begun and completed wholly by and between the living; the generating source of either type of gift is to be found in the facts of life and not in the circumstances of death. The only relationship that it has to death is that the value at death of the property is the measure of the tax imposed thereon, but this is a mere administrative device.

Helvering v. *Hallock* (1940), 309 U. S. 106, 84 L. Ed. (Adv. Sh.) 382, 60 Sup. Ct. (Adv. Sh.) 444;

Heiner v. *Donnan* (1932), 285 U. S. 312, 76 L. Ed. 772, 52 Sup. Ct. 358.

There is no tenable difference between the jurisdiction possessed by the states of the situs of property to tax transfers *inter vivos* and on the death of the owner.

Frick v. *Pa.*, (1924) 268 U. S. 473, 69 L. Ed. 1058, 45 Sup. Ct. 603.

Jurisdiction to tax and the assertion of taxing power are interfered with only when the challenged tax is in *plain violation* of the constitution and there has been such flagrant abuse as may be remedied by some *affirmative* principle of constitutional law.

Newark Fire Ins. Co. v. *State Board*, (1939) 307 U. S. 313, 83 L. Ed. 1312, 59 Sup. Ct. 918;

So. Pac. v. *Ky.*, (1911) 222 U. S. 63, 56 L. Ed. 110, 32 Sup. Ct. 27.

From the foregoing it appears that the decision of the Supreme Court of Wisconsin on the Federal question was so plainly right as not to require reargument, and therefore no substantial Federal question is presented.

Re Boardman, (1897) 169 U. S. 39, 42 L. Ed. 653, 18 Sup. Ct. 291;

Re Spies, (1887) 123 U. S. 131, 31 L. Ed. 80, 8 Sup. Ct. 22.

Respectfully submitted,

JOHN E. MARTIN,
Attorney General of the State of Wisconsin;
HAROLD H. PERSONS,
Assistant Attorney General of the State of Wisconsin,
Counsel for Appellees.

P. O. Address:
State Capitol,
Madison, Wisconsin.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 265

WILLIAM D. VAN DYKE, JR., AND DOUGLASS VAN DYKE, AS TRUSTEES, UNDER TRUST AGREEMENT DATED DECEMBER 6, 1935, *Appellants,*

VS.

WISCONSIN TAX COMMISSION; JOHN H. LEENHOUTS, ASSESSOR OF INCOMES OF MILWAUKEE COUNTY; STATE OF WISCONSIN; WISCONSIN DEPARTMENT OF TAXATION; AND ELMER E. BARLOW, AS COMMISSIONER OF TAXATION OF THE STATE OF WISCONSIN, *Appellees.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

MOTION TO DISMISS APPEAL OR AFFIRM.

Comes now the Wisconsin Tax Commission; John H. Leenhouts, Assessor of Incomes of Milwaukee County; State of Wisconsin; Wisconsin Department of Taxation; and Elmer E. Barlow, as Commissioner of Taxation of the

> "As was said in Clark *v.* Keith, 106 U. S. 464 (Bk. 27, L. Ed. 302), 'That question is no longer open in this case, for the reason that it has long been settled that whatever has been decided here on one writ of error cannot be reexamined on a subsequent writ brought in the same suit. This rule was distinctly stated in Supervisors *v.* Kennicott, 94 U. S. 498 (Bk. 24, L. Ed. 260), where numerous authorities are cited, beginning as early as Himely *v.* Rose, 5 Cranch, 313' (9 U. S. bk. 3 L. Ed. 111)."

Upon the prior appeal, appellee stood on its demurrer, admitting the contract to be validly executed in Tennessee (*Osborn* v. *Ozlin*, — U. S. —, 84 L. Ed. 709), and into that Tennessee contract, sought to integrate Mississippi's Code Sections 2294 and 5131, which was permitted by Mississippi's Supreme Court but denied by this Court, and thereasto, we submit:

(1) *This Court on the prior appeal considered and adjudged naught but deprivation of due process under the Federal Constitution.*

In *Hanley* v. *Donohue*, 116 U. S. 7, 27 L. Ed. 536, Syllabus 3, it is held:

> "An allegation as to the legal effect of a judgment • • • is admitted by demurrer."

and pursuant to appellee's rights, as adjudged in Appendix "A", appellee stood squarely upon its two Mississippi statutes, which it asserted gave it a right to a judgment and when the cause was heard before, appellee urged naught else to affirm, and properly so, because on that appeal, this Court's jurisdiction was limited to the Federal questions raised.

As said by Mississippi's court, 195 So. 671:

> "It was held in the recent case of McGoldrick, Comptroller of the City of New York, *v.* Compagnie Gen-

erale Transatlantique, 60 S. Ct. 670, 672, 84 L. Ed. —, decided by the Supreme Court of the United States on March 25, 1940, that: 'It is also the settled practice of this court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed in the courts below. Blair *v.* Oesterlein Co., 275 U. S. 220, 225, 48 S. Ct. 87, 88, 72 L. Ed. 249; Duignan *v.* United States, 274 U. S. 195, 200, 47 S. Ct. 566, 568, 71 L. Ed. 996.' And, in the course of its opinion, the Court further stated: 'In the exercise of our appellate jurisdiction to review the action of state courts we should hold ourselves free to set aside or revise their determinations only so far as they are erroneous and error is not to be predicated upon their failure to decide questions not presented.' The question of whether or not the requirement of the bond in controversy was a condition precedent to liability, under the Tennessee decisions, not having been presented by the demurrer, or argued in the briefs on the former appeal, should not be deemed to have been decided by the state Court when it affirmed the judgment of the trial court in sustaining the demurrer; but rather that the Court merely assumed that the proposition was to be conceded in the absence of an argument by the appellee to the contrary—an argument which the appellee was not required to make until after the federal question presented by the demurrer should have been first disposed of adversely to its contention, since a favorable decision in all the courts sustaining the demurrer would have rendered immaterial the decisions of the Tennessee Court on the question of whether the provisions of the bond involved was a condition precedent under the laws of that state.''

(2) *No jurisdiction in this Court upon the prior appeal to consider non-Federal questions.*

Appellee, on the prior appeal, did not seek to advert to Tennessee law, and did not, under Mississippi practice, raise that question in any way (Appendix A), and the jurisdiction of this Court is limited to Federal questions properly presented. Following this Court, Mississippi's court said:

> "Moreover, the jurisdiction of that court was necessarily confined to the federal question presented by the appeal, that is to say, whether the Supreme Court of Mississippi had erred in holding that the Mississippi statutes referred to, instead of the laws of Tennessee, should govern this contract made in Tennessee. Judicial Code, Section 237, as amended, 28 U. S. C. A., Section 344, Simpkins' Federal Practice 3rd Ed., section 953, page 283, Brinkerhoff, etc., Co. *v.* Hill, 281 U. S. 673, 680, 50 S. Ct. 451, 74 L. Ed. 1107, 1113. Most assuredly, the issue of whether a provision in a contract of indemnity requiring a claim of loss to be made within a specified time, was a condition precedent to liability could not be deemed a federal question."

(3) *The questions determined on this appeal by Mississippi's court as to what was decided on the prior appeal is conclusive here.*

Res adjudicata is not a Federal, but a local question, and on the prior appeal, appellee made no question as to the law of Tennessee, which was not (a) presented to, (b) argued before, or (c) considered by Mississippi's court, and under Mississippi's decisions, Appendix A, the law in Tennessee became applicable first in due course when this Fourth Replication was interposed, and as against this decision there could not be any such thing as "law of the case". *Middlesex Banking Co.* v. *Field,* 84 Miss. 666:

> "It will be observed that I have confined the opinion to a ground not touched in the former opinion of the Court. Field *v.* Banking Co., 77 Miss. 180."

Brewer v. *Browning*, 115 Miss. 358, 76 So. 519; *State* v. *L. & N. Railroad*, 97 Miss. 35, 51 So. 918, 104 Miss. 413, 61 So. 425, 107 Miss. 507, 65 So. 881.

In *Sperry's Estate* v. *Sperry*, 196 So. (Miss.) 653, the rule is stated in Syllabus 2:

> "Where a case is reversed and remanded generally by the Supreme Court, it is tried de novo in the lower court, and additional pleadings may be interposed and additional evidence may be offered on the pleadings."

At page 656:

> "Where a case is reversed and remanded generally by this Court, it is in the lower court tried de novo. Additional pleadings may be interposed and additional evidence on the pleadings" (citing cases).

(4) *What the law of Tennessee was as a fact was not in issue until the present appeal.*

The decision on demurrer was not in any way controlling. *Central Trust Co.* v. *Meridian Light & Railway Co.*, 64 So. 216, 46 So. 415.

(5) *When, pursuant to remand, the State court accepts as binding that precedently determined in this Court, the construction thereafter of the local law—without challenge as to its validity, is not a Federal question.*

Pennsylvania Fire Ins. Co. v. *Gold Issue Mining, etc., Co.*, 243 U. S. 95, 61 L. Ed. 616.

In note, 74 A. L. R. 716, the rule is thus stated:

> "It is quite generally accepted that where the statute of the situs is merely construed in the court of the forum, without a denial of its validity, though it be construed erroneously, particularly in the absence of a construction of the statute by the courts of the situs, such a construction does not deny to the statute the full faith and credit required by the Constitution, and hence a litigant cannot complain that his rights acquired

> under the laws of another state were not recognized or enforced by the courts of the forum" (citing cases).

Furthermore, as at the date of the prior appeal, *Swift* v. *Tyson,* 16 Pet. 1, 10 L. Ed. 865, was operative here, and thereunder, as to this principle of general commercial law, this Court would have applied its independent judgment, but presently must apply the Tennessee decisions under *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, 78, 82 L. Ed. 1188, 1194, where it is said:

> "There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general', be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts."

So that the rule of law applicable here has thus been fundamentally changed and, therefore, when Mississippi's court recognized the mandate of this Court, to consider naught but Tennessee law, it did its full duty, and having so done, under the authorities, no Federal question presently exists.

b. In re: Blake, 175 U. S. 114, 44 L. Ed. 94:

This case is next cited by appellant, but it merely held that mandamus would not lie to compel the Supreme Court of Tennessee to conform to what the petitioner there believed to have been established by this Court.

Here, no statute of Mississippi is involved as on the former appeal. Mississippi's court has given full effect to delete Mississippi Code Sections 2294 and 5131, and having so done, considered this contract solely under Tennessee's laws. This Court by its mandate on the prior appeal merely enjoined upon Mississippi's court, if the contract sued on were a Tennessee contract under the facts validly effected, *Osborn* v. *Ozlin,* — U. S. —, 84 L. Ed. 709, to apply the Ten-

nessee law. This Court was not requested to construe the Tennessee law, nor to apply the Tennessee law, nor adjudicate the rights of the parties thereunder further than it was requested to remove from consideration Mississippi's statutes, which were without effect thereasto. On the second appeal to Mississippi's court, the Tennessee law alone was looked to and construed, it being admitted that such law was, under the Fourth Replication, that solely applicable, and therefor this then became a question of construction, naught else.

In *Allen* v. *Alleghany Co.*, 196 U. S. 458, 49 L. Ed. 551, there was a motion to dismiss and plaintiffs in error pleaded that the note upon which suit was brought was executed in New York and that under the laws of that State, no foreign corporation could do business without a certificate of the Secretary of State that it had complied with all of the requirements of the law and that no such corporation could sustain any action in the State without complying with conditions. The Supreme Court of New Jersey held that though not enforceable in the courts of New York and Pennsylvania, it might be enforced in New Jersey and plaintiff in error insisted that under the full faith and credit clause, there was a denial as to the statutes of New York in contravention of the constitution. This Court said:

> "In several cases we have held that the construction of a statute of another state, and its operation elsewhere, did not necessarily involve a Federal question. The case is practically governed by that of Chicago & A. R. Co. *v.* Wiggins Ferry Co., 119 U. S. 615, 30 L. Ed. 519, 7 Sup. Ct. Rep. 398."
>
> * * * * * * *
>
> "Since the above case we have repeatedly held that the mere construction by a state court of a statute of another state, without questioning its validity, does not, with possibly some exceptions, deny to it the full

faith and credit demanded by the statute in order to give this court jurisdiction" (citing cases).

In *Smithsonian Institution* v. *St. John*, 214 U. S. 19, 53 L. Ed. 892, this Court said:

> "On the other hand, it is settled that the mere construction by a state court of the statute of another state, without questioning its validity, does not deny to it the full faith and credit demanded by the constitutional provision (citing cases)."

In *Johnson* v. *New York Life Ins. Co.*, 187 U. S. 491, 47 L. Ed. 273, Mr. Justice Brown said:

> "Whether the supreme court of Iowa was correct in its construction of the applicability of the New York notice statute to this policy was immaterial, since it did not deny the full faith and credit due to the New York law, but construed it as not applying to the policy in this case. The case is covered by that of Banholzer *v.* New York L. Ins. Co., 178 U. S. 402, 44 L. Ed. 1124, 20 Sup. Ct. Rep. 972, and in principle by Glenn *v.* Garth, 147 U. S. 360, 37 L. Ed. 203, 13 Sup. Ct. Rep. 350; Lloyd *v.* Matthews, 155 U. S. 222, 39 L. Ed. 128, 15 Sup. Ct. Rep. 70. To hold otherwise would render it possible to bring to this court every case wherein the defeated party claimed that the statute of another state had been construed to his detriment.
>
> "The validity of the New York statute was not called in question. The case turned upon its construction. This was not a Federal question. Commercial Bank *v.* Buckingham, 5 How. 317, 12 L. Ed. 169; Baltimore & P. R. Co. *v.* Hopkins, 130 U. S. 210, 32 L. Ed. 908, 9 Sup. Ct. Rep. 503.
>
> "The writ of error is dismissed."

The *Blake* case is likewise distinguishable upon the grounds urged, *supra*, as to the *Chaffin* v. *Taylor* case (116 U. S. 567, 29 L. Ed. 727).

c. Appellant next relies upon *Georgia Ry. etc. Co.* v. *City of Decatur,* 297 U. S. 620, 80 L. Ed. 926. With deference, this case directly supports appellee's contention. Said this Court:

> "After notice to the parties, the Supreme Court, with felicitous recognition of obligation to do nothing in conflict with the ruling here, again considered the original record. September 30, 1935, after disclaiming any purpose theretofore to construe the pertinent State statutes as unhappily chosen words had led us to conclude, it announced their meaning and once more affirmed the decree of the trial court. 181 Ga. 187, 182 S. E. 32. A second appeal gives us jurisdiction.
>
> "Appellants insist, first, that the decree presently challenged is not consistent with our opinion and mandate; and, second, that, if the Georgia statutes be construed and applied as finally ruled by her Supreme Court, they will be deprived of equal protection and due process of law, contrary to the Fourteenth Amendment.
>
> "As appears from our opinion of April 29, 1935, following long established doctrine, we accepted the construction of the statutes placed upon them by the Supreme Court and decreed accordingly. Elmendorf *v.* Taylor, 10 Wheat. 152, 159, 6 L. Ed. 289, 292; Chicago, M. St. P. & P. R. Co. *v.* Risty 276 U. S. 567, 570, 72 L. Ed. 703, 706, 48 S. Ct. 396. So regarded, they empowered the municipality to assess paving costs against the utility only upon the basis of benefits received. And, as appellants had been deprived of opportunity to show the absence of advantage, we held due process of law had been denied.
>
> "After the first decree was reversed and set aside, the cause went back for disposition by the Supreme Court. Our mandate restricted its powers in that regard so far as necessary to prevent conflict with rulings here, but not otherwise. Only federal questions were open for our determination. We accepted the construction placed upon the statutes by the Supreme Court and held that so to apply them would deprive appellants

of a federal right. We suggested no interpretation of our own, and did not affimatively indicate the further action to be taken. Schneider Granite Co. *v.* Gast, 245 U. S. 288, 291, 62 L. Ed. 292, 295, 38 S. Ct. 125. The decree now under consideration is not in conflict with anything said or done by us. Appellants' claim to the contrary is not well founded. Without exceeding the limitations prescribed, the Supreme Court reconsidered the cause, put its own construction upon the statutes, and adjudged accordingly."

Mississippi's Court, pursuant to the mandate of this Court, deleted Mississippi's statute and construed Tennessee's laws, assuming them to be valid, and this contract to be governed thereby.

This Court is jealous of its jurisdiction, saying in *Southwestern Bell Tel. Co.* v. *Oklahoma,* 303 U. S. 212, 82 L. Ed. 755:

> "We have repeatedly held that it is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause; that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it (Citing cases)."

Further, in *Glenn* v. *Garth,* 147 U. S. 360, 37 L. Ed. 203, at pages 368—206, the Chief Justice said:

> "If every time the courts of a state put a construction upon the statutes of another state, this court may be required to determine whether that construction was or was not correct, upon the ground that if it were concluded that the construction was incorrect, it would follow that the state courts had refused to give full faith and credit to the statutes involved, our jurisdiction

would be enlarged in a manner never heretofore believed to have been contemplated.

"The distinction between the construction of a statute and the validity of a statute has frequently been adverted to by this court. Baltimore & P. R. Co. *v.* Hopkins, 130 U. S. 210 (32:908) and cases cited. In Grand Gulf R. & Bkg. Co. *v.* Marshall, 53 U. S. 12 How. 165 (13:938) the case was brought up from the supreme court of Louisiana, and involved an assignment by a corporation of Mississippi under the laws of that state. Mr. Chief Justice Taney, delivering the opinion of the court, after stating that, 'in order to give this court jurisdiction the record must show that the point was brought to the attention of the state court and decided by it,' for the obvious reason that 'the party is authorized to bring his case before this court, because a state court has refused to him a right to which he is entitled under the Constitution or laws of the United States; but if he omits to claim it in the state court there is no reason for permitting him to harass the adverse party by a writ of error to this court, when, for anything that appears in the record the judgment of the state court might have been in his favor if its attention had been drawn to the question,' goes on to say that 'it appears that the decision turned upon the construction (not the validity) of the act of Mississippi of 1840; and upon a question of merely local law, concerning the right by prescription claimed by the trustees. Nothing is said in relation to the constitutionality or validity of this act of Mississippi, and the opinion of the court clearly shows that no such question was raised or decided.' The writ of error was therefore dismissed for want of jurisdiction. It does not seem to have occurred to the Chief Justice that the writ could be maintained upon the ground of a denial of full faith and credit to the Mississippi statute by the construction given by the Louisiana court."

Appellant did not demur to the Fourth Replication as it did to the precedent three replications, but voluntarily took in the lower court precisely the same view thereof as was

taken by Mississippi's Supreme Court, conceding that if under the proper construction of Tennessee's decisions there was liability, then thereunder appellant was liable, and the Mississippi Court, construing said Tennessee law (admitting its applicability and validity), as directed, did not in so construing, determine any Federal question, but conformed strictly to the mandate given, frankly, going further than Mississippi's court was required to go, this Court having said of this decision in *Osborn* v. *Ozlin*, — U. S. —, 84 L. Ed. 709:

> "(This contract) *validly made* in Tennessee, could not be subsequently enlarged by Mississippi to do as to a condition of 'substantial importance' when suit was later brought on the policy in Mississippi, simply because 'the interest insured was in Mississippi when the obligation to indemnify * * * matured, and it was * * * (the company's) duty to make payment there.' 292 U. S. at 149, 78 L. Ed. 1181, 54 S. Ct. 634, 92 A. L. R. 931. At the time the contract was entered into Mississippi had no interest in the risk covered. The court felt that, even at the time of suit, 'performance at most involved only the casual payment of money in Mississippi,' *Id.* 292 U. S. at 150, 78 L. Ed. 1182, 54 S. Ct. 634, 92 A. L. R. 931, and that was an interest so subordinate to that of Tennessee that the latter was entitled to have the right of way. No question was thus involved touching the right of a state to regulate companies doing business within its borders as to contracts of insurance covering local risks."

When appellee took issue thereon, it developed that appellee had never qualified to do business in Tennessee and under Tennessee's decisions could not appear therein as a corporate entity. *Campbell-Moss-Johnson* v. *Lupton*, — Tenn. —, 290 S. W. 992, 51 A. L. R. 374, note 384, 390. And thereby it may well have been presumed, appellee being without corporate power, that the parties intended to make

the contract lawful by *situsing* it in Mississippi. *Pritchard* v. *Norton*, 106 U. S. 124, 136, 27 L. Ed. 104, 108; 11 *Am. Juris.*, 405; 2 *Beale, Conflict of Laws*, 1165, Sec. 332.49. But Mississippi's court, under appellant's admission, assumed Tennessee's laws to be solely applicable, and so assuming, in good faith, construed them properly, and thereby no Federal question arose.

Point II.

Appellant's Second Assignment is: "The Supreme Court of Mississippi was in error in holding that under the Tennessee decisions the provision of the bond that any claim thereunder must be made upon the surety within fifteen months after termination of its suretyship for the defaulting employee, was not a condition precedent, compliance with which was essential to a recovery upon the bond."

But thereof,

(a) No point is made under the statement as to jurisdiction;

(b) Where there is mere construction without a challenge of validity, no Federal question arises. *Smithsonian Institute* v. *St. John*, 214 U. S. 19, 35 L. Ed. 872; *Finney* v. *Guy*, 189 U. S. 35, 47 L. Ed. 839; *Glenn* v. *Garth*, 147 U. S. 360, 368, 37 L. Ed. 203, 206.

This precise point was decided adversely to us by this Court in *Canal Commercial Tr. & Sv. Bank* v. *Brewer*, 273 U. S. 638, 71 L. Ed. 816, where Mississippi's court merely construed but did not question a Louisiana statute.

(c) This Court had no jurisdiction under Section 237, Judicial Code, as amended, 28 U. S. C. A., Section 344.

This Section grants jurisdiction—

(a) Where there is "drawn in question the validity of a treaty or statute of the United States • • • the validity

of a statute of any state," when review may be had by appeal;

(b) By Certiorari when there is "drawn in question the validity of a treaty or statute of the United States * * * the validity of a statute of any state * * * or where any title, right, privilege or immunity is specially set up or claimed, by either party under the Constitution, or any treaty or statute of * * * the United States."

On this appeal there is no statute whatsoever in Tennessee, no statute in Mississippi, but only a determination by Mississippi's court as to what the Tennessee decision holds to be the law in Tennessee as to a matter of private contract under an insurance policy. Mississippi's analysis, with deference, of Tennessee's decisions is perfectly correct, but under the decisions of this Court, quoted *supra*, even if it were not, this Court would have no jurisdiction.

WHEREFORE, Mississippi's court having recognized the mandate and deleted from consideration the sections condemned, namely, 2294 and 5131, this Court is without jurisdiction of this appeal, but if therein we err the judgment should be affirmed forthwith because no substantial Federal question not previously fully adjudicated is herein presented.

Respectfully,

MARCELLUS GREEN,
Jackson, Mississippi;
WALTER SILLERS,
Rosedale, Mississippi;
W. C. ROBERTS,
Rosedale, Mississippi;
OSCAR JOHNSTON,
Scott, Mississippi;
GARNER W. GREEN,
Jackson, Mississippi;
Attorneys for Appellee.

APPENDIX "A".

SUPREME COURT OF MISSISSIPPI.

No. 33674.

HARTFORD ACCIDENT & INDEM. CO. *v.* DELTA & PINE LAND CO., 195 So. 667.

April 29, 1940.

1. *Courts* Key 97(6).

Where in action on fidelity bond, demurrer was sustained to plea relying on policy requirement that claim be made within five months after termination of the suretyship, on ground that such requirement was invalid under Mississippi statutes, but such determination was reversed by United States Supreme Court on ground that Tennessee rather than Mississippi law was applicable, because the contract was made in Tennessee though defalcations occurred in Mississippi, a federal question only was involved, and such decision was not 'law of the case' so as to require determination, under replications to the plea, that such requirement was valid under Tennessee law, notwithstanding that courts had assumed that Tennessee law was favorable to insurer. Code 1930, Sections 2292, 2294, 5131; U. S. C. A. Const. art. 1, Section 10; art. 4, Section 1; Amend. 14, Section 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Law of the Case."

2. *Courts* Key 97(6).

On appeal from decision of Mississippi Supreme Court affirming judgment sustaining demurrer to plea relying on policy provision that was invalid under Mississippi statutes, jurisdiction of United States Supreme Court was necessarily confined to the federal question presented, of whether state Supreme Court had erred in holding that Mississippi statutes rather than Tennessee law should govern contract made in Tennessee, and determination of whether provision requiring claim of loss to be made within a specified time was a condition precedent to liability could not be deemed

a "federal question". Jud. Code Section 237, as amended, 28 U. S. C. A. Section 344.

See Words and Phrases, Permanent Edition, for all other definitions of "Federal Question."

3. *Insurance* Key 539(5).

Where fidelity bond made the sustaining of loss, filing of claim, and proof of loss with home office, and filing of suit within 12 months after making of claim, the only conditions precedent to liability, failure to comply with condition requiring the claim to be made within 15 months after loss merely postponed the time for bringing suit, under Tennessee law, and did not forfeit the right to recover.

4. *Insurance* Key 146(3).

Under Tennessee and Mississippi law, provision making a policy requirement a condition precedent to liability by authorizing forfeiture for failure to comply with such requirement must be either expressed or clearly implied from the terms employed.

ETHRIDGE, *J.*, dissenting.

In Banc.

Appeal from Circuit Court, Bolivar County; Wm. A. Alcorn, Jr., Judge.

Action by the Delta & Pine Land Company against the Hartford Accident & Indemnity Company, to recover on fidelity bond. From a judgment for plaintiff, defendant appeals.

Affirmed.

Shands, Elmore, Hallam & Causey, of Cleveland, and Wm. M. & Wm. G. Hall, of Memphis, Tenn., for appellant.

Sillers & Roberts, of Rosedale, and Green, Green & Jackson, of Jackson, for appellee.

McGEHEE, Justice.

This case was first argued orally before, and submitted to, Division B of the Court for decision, and the judgment of

the court below in favor of the appellee was reversed and the cause dismissed. On suggestion of error, a request was made of counsel to file additional briefs on the question of whether or not a clause contained in the fidelity bond sued on, requiring any claim thereunder to be made within fifteen (15) months after the termination of the suretyship for the defaulting employe, was a condition precedent to liability. This point had been raised in the *fourth* replication filed in the trial court, by the appellee to the plea of the appellant, and that court had held that the right of action could not be defeated, "unless there is some forfeiture in the bond, or there is some stipulation that there will be no liability." In the opinion rendered by Division B as aforesaid, as reported in 188 So. 539, it was said that *three* replications to the appellant's plea had been filed in the trial court. The substance of the first three replications was then set forth in the opinion, and it was held that the demurrers thereto should have been sustained. These three replications merely set forth anew, and also urged additional grounds for, the contention theretofore made by the appellee on a former appeal of the case to this Court, as reported in 169 Miss. 196, 150 So. 205; and to the Supreme Court of the United States, 292 U. S. 143, 54 S. Ct. 634, 78 L. Ed. 1178, 92 A. L. R. 928, to the effect that the rights of the parties under the fidelity bond sued on were governed by sections 2294 and 5131 of the Mississippi Code of 1930 and the decisions of our Court, instead of the laws of the State of Tennessee, whereas, the fourth replication raised for the first time the specific issue of whether or not, even under the Tennessee decisions, a compliance with the clause of the fidelity bond, relied on in appellant's plea as a bar to recovery, was made a condition precedent to liability, as will be hereafter shown. In the opinion rendered by Division B on the present appeal, 188 So. 539, supra, no reference was made to this fourth replication, nor was the point involved therein specifically discussed or decided, on account of the fact that the briefs of counsel were largely devoted to reargument of the questions again raised by the first three replications, which had been settled adversely to the appellee's contention by the decision of the United States Su-

preme Court, 292 U. S. 143, 54 S. Ct. 634, 78 L. Ed. 1178, 92 A. L. R. 928, supra, reversing the decision of this Court on the former appeal, as rendered in 169 Miss. 196, 150 So. 205, supra. Upon consideration of the suggestion of error and briefs thereon, the opinion rendered by Division B, as aforesaid, was withdrawn, the judgment of reversal set aside, the cause remanded to the docket for argument before Division A, and thereafter submitted for decision by the Court in banc.

The appellant Indemnity Company contends that the appellee was precluded by the law of the case from raising the issue presented by its fourth replication to the appellant's plea, after the remand of the case to the Circuit Court of Bolivar County for further proceedings not inconsistent with the opinion rendered by the Supreme Court of the United States aforesaid; also, that under the laws of Tennessee its plea is good, and was sustained by the proof. To determine these two questions it is necessary to first state the issue involved on the former appeal here, and the federal question presented to the Supreme Court of the United States when it reversed the former decision of this Court; and second, to review the decisions of the Tennessee Court and the law as stated by the text writers on the question of whether or not a non-compliance with the provision of the fidelity bond relied on as a defense to the suit is a condition precedent to liability, or whether a failure to comply therewith merely serves to postpone the right to sue.

On the former appeal the appellee had recovered a judgment against the appellant Indemnity Company for the sum of $2,703.79 because of the alleged default of H. H. Harris, who was listed in a fidelity bond as the treasurer of the appellee, employed in its office at Memphis, Tennessee, and whose honesty and fidelity, was insured to the extent of any defalcations, committed in any position, anywhere, not exceeding the sum of $25,000, and which bond was entered into and consummated in the state of Tennessee, where the appellee then had its principal office, and where the appellant Indemnity Company maintained a local office.

The declaration alleged that subsequent to the execution and delivery of the contract of indemnity at Memphis, the

appellee moved its office to Scott, Mississippi, where the defalcations of Harris occurred on various dates between May 9, 1929, and September 20, 1929, all in Bolivar County, Mississippi, where the appellee was then engaged in conducting a large planting operation as its principal business. That these defalcations were not discovered in the exercise of due diligence until May 24, 1931, when notice was given immediately to the appellant. That within three months thereafter affirmative proof of the loss was filed with the appellant at its home office at Hartford, Connecticut; and the suit was filed within twelve (12) months of the filing of the proof of loss, as required by the policy.

The contract of indemnity was terminated on December 31, 1929, and the appellee had not made its claim until June 22, 1931, which was more than fifteen months after the termination of the contract of suretyship, but within thirty (30) days of the discovery of the shortage, according to the allegations of the declaration.

The appellant filed a plea to the declaration, to the effect that the cause of action could not be maintained for the reason that the contract contained the additional clause which provides that, "Any claim must be duly made upon the surety within fifteen (15) months after the termination of the contract of suretyship for the defaulting employee, • • •." And the plea averred that plaintiff did not make claim for its loss within the time above required. That, wherefore, the plaintiff should not have its action against the defendant for the reason that the fidelity bond sued on is a Tennessee contract, and is governed by the laws of that state. That, therefore, full faith and credit must be given thereto in the courts of Mississippi under the requirements of article 4, section 1, article 1, section 10, and section 1 of the Fourteenth Amendment to the Constitution of the United States, since there is no statute in Tennessee which prohibits the limitation aforesaid in such contracts of insurance or indemnity, and averred that the highest court of Tennessee, in the cases of Guthrie *v.* Indemnity Ass'n, 101 Tenn. 643, 49 S. W. 829; Phoenix Cotton Oil Co. *v.* Royal Indemnity Co., 140 Tenn. 438, 205 S. W. 128; City of Bristol *v.* Bostwick, 146 Tenn. 205, 240 S. W. 774, and other deci-

sions of that court not cited in the plea, had held that such a limitation was valid and binding.

Instead of replying to this plea by saying that while it is true that the provision in the bond, non-compliance with which the defendant had set up therein as a defense, is valid and binding under the decisions of the Tennessee court, and not prohibited in such contracts by any statute of that state, it did not constitute a condition precedent to liability, since the contract did not so provide, nor provide for a forfeiture in the event of a failure to comply therewith—the plaintiff saw fit not to then file a replication to the legal conclusion contained in the defendant's plea of the effect of the Tennessee decisions, or to plead the fact, to be disclosed by the evidence, that the contract contained no clause providing for a forfeiture for failure to make claim for the loss within fifteen (15) months after the termination of the contract of suretyship, or clause making the filing of the claim within that time a condition precedent to liability, but demurred to the plea and assigned the following grounds:

"1. The construction and validity of the provision in the contract requiring that any claim thereunder must be duly made upon the defendant, the surety, within fifteen (15) months after the termination of the suretyship for the defaulting employee is not determined by the laws of the state of Tennessee but is determined by the laws of the state of Mississippi.

"2. The statutes of limitations of the state where the suit is brought is the statute of limitations which governs the time within which actions may be brought, and the provision in the contract requiring that any claim thereunder must be duly made upon the defendant, the surety within fifteen (15) months after the termination of the suretyship for the defaulting employee is in violation of section 2294 of the Mississippi Code of 1930 (section 2491 of Hemingway's 1917 Code of Mississippi), and in violation of the public policy of the state of Mississippi, and the courts of this state are not required to give full faith and credit to said provision under and in accordance with the requirements of article 4, section 1; article 1, section 10

and section 1 of the Fourteenth Amendment of the Constitution of the United States as contended in defendant's said plea."

The Circuit Court of Bolivar County having sustained this demurrer, the defendant Indemnity Company declined to plead further, and the judgment was thereupon rendered against it for the alleged defalcations of the plaintiff's employee, Harris, in the sum hereinbefore mentioned. On the appeal here, as reported in 169 Miss. 196, 150 So. 205, supra, the Court affirmed the judgment of the Circuit Court, on the ground that section 5131 of the Mississippi Code of 1930, defining insurance, rendered the fidelity bond sued on a contract of insurance, and solvable under the laws of this state, though made in Tennessee, since the statute provides that, "All contracts of insurance on property, lives or interests in this state shall be deemed to be made therein;" and, further, that in view of the fact that section 2292 of said Code provides that, "All actions for which no other period of limitation is prescribed shall be commenced within six years next after the cause of such action accrued, and not after," and section 2294 thereof renders null and void any change in this limitation by contract between the parties, the plea constituted no defense to the suit. In so holding that these statutes rendered the contract solvable under the laws of Mississippi instead of Tennessee, our Court was adhering to its former decisions in that regard, whereby the Court, as observed in the opinion referred to, had committed itself to the proposition that a contract of insurance on an interest in this state, although the contract be made in another state, was to be determined by the laws of our own state; and cited in support thereof the cases of Fidelity Mutual Ins. Co. *v.* Miazza, 93 Miss. 18, 46 So. 817, 136 Am. St. Rep. 534; Stuyvesant Ins. Co. *v.* Smith Motor Sales Co., 135 Miss. 585, 99 So. 575, which so held. Hence, the appellee was entitled to assume on that appeal that the only question presented to the Court here for decision on the declaration, plea, and demurrer was whether these Mississippi statutes and decisions would govern the rights of the parties to the contract of suretyship sued on, or

whether they were to be governed by the laws of Tennessee, since the limitation in controversy would be unenforceable under the statutes and decisions of the state of Mississippi, if applicable, without regard to whether or not the limitation constituted a condition precedent to liability under the laws of Tennessee. Neither do the briefs, as officially reported in the case on the former appeal, 169 Miss. 196, 150 So. 205, supra, show that the contention was made therein that the provision in the bond, requiring any claim thereunder to be duly made upon the surety within fifteen (15) months after the termination of the suretyship for the defaulting employee, was a condition precedent to liability under the laws of Tennessee; nor is there a Tennessee case cited in the briefs. The only decisions of that Court referred to at all are those listed in the appellant's plea, and they do not sustain the affirmative of that proposition, as will be hereinafter shown. In other words, the sole question presented by the plea and demurrer, and argued in the briefs at that time was the question of whether or not the laws of Mississippi could be integrated into this Tennessee contract. This was the issue presented by the declaration, plea and demurrer, and no other question was properly before the Court for decision.

From that decision the case was appealed to the Supreme Court of the United States, and the sole grounds of error assigned were:

"The Supreme Court of Mississippi erred in holding, that under section 5131 of the Mississippi Code of 1930 the bond or policy of insurance sued upon, made and to be performed in Tennessee, was to have been deemed to have been made in Mississippi and solvable under the laws of Mississippi because upon an interest in Mississippi, and therefore under section 2294, Mississippi Code of 1930, the provision of said bond of policy that claim thereunder must be made upon the surety within fifteen months after termination of the suretyship, valid under the Laws of Tennessee, was null and void because in conflict with the limitation on actions upon such contracts prescribed by the laws of Mississippi, in that said statutes in such construction and ap-

plication were made repugnant to Article IV, Section 1 and Section 1 of the 14th Amendment to the Constitution of the United States.

2. "The Supreme Court of Mississippi erred in holding that the bond or policy sued upon was upon an interest in the state of Mississippi."

The Supreme Court of the United States thereupon reversed the decision of this Court, and remanded the cause for further proceedings not inconsistent with its opinion. Hartford Accident & Indemnity Co. *v.* Delta & Pine Land Co., 292 U. S. 143, 54 S. Ct. 634, 78 L. Ed. 1178, 92 A. L. R. 928. Upon such remand the Supreme Court of this state remanded the case to the Circuit Court of Bolivar County, without any further opinion.

(1) The question at issue before the United States Supreme Court is clearly indicated in the syllabi of the case, as being a federal question only. See 292 U. S. 143, 54 S. Ct. 634, 78 L. Ed. 1178, 92 A. L. R. 928, as follows:

"A state may, without violating the due process clause, limit or prohibit the making of certain contracts within its own territory; but cannot extend the effect of its laws beyond its borders so as to destroy or impair the right of citizens of other states to make a contract not operative within its jurisdiction, and lawful where made.

"2. A state may not, in an action based upon a contract lawful where made and operative, enlarge the obligations of the parties to accord with every local statutory policy solely upon the ground that one of the parties is its own citizen.

"3. A state may not, without violating the due process clause of the Federal Constitution, apply to an employee's fidelity insurance contract, entered into in another state, its own statute annulling any contractual limitation of the time for giving notice of claim, although the default occurred after the removal of the insured and his defaulting employee to the state in which the action is brought."

(2) Moreover, the jurisdiction of that court was necessarily confined to the federal question presented by the appeal, that is to say, whether the Supreme Court of Mississippi had erred in holding that the Mississippi statutes referred to, instead of the laws of Tennessee, should govern this contract made in Tennessee. Judicial Code, Sec. 237, as amended, 28 U. S. C. A. Sec. 344, Simpkins' Federal Practice 3rd Ed., section 953, page 283, Brinkerhoff, etc., Co. *v.* Hill, 281 U. S. 673, 680, 50 S. Ct. 451, 74 L. Ed. 1107, 1113. Most assuredly, the issue of whether a provision in a contract of indemnity requiring a claim of loss to be made within a specified time, was a condition precedent to liability could not be deemed a federal question. Having determined that the bond sued on was a Tennessee contract by virtue of having been executed and delivered in that state, and was not changed into a Mississippi contract by virtue of our statutes and decisions because of the fact that the defalcations occurred here where the services of the employee were being rendered, and that therefore the laws of Tennessee should have been applied by the state court in determining the effect of the provision of the contract, the non-compliance with which was set up in the plea of the indemnity company as a defense, it is to be assumed that the Supreme Court of the United States in so holding and in remanding the case for further proceedings had in contemplation that the plaintiff in the trial court would be required to reply to the plea, since its demurrer thereto had been held to be without merit, and that both the trial court and this Court would then be called on for the first time to construe and apply the laws of Tennessee in deciding whether a compliance with the provision set forth in the plea constitutes a condition precedent to liability.

It is true that this Court on the former appeal, 169 Miss. 196, 150 So. 205, 206, supra, when the appellee therein was relying solely on the issue raised by its demurrer, the grounds of which are hereinbefore fully set forth, erroneously assumed and stated that: "It is to be conceded that under the adjudicated decisions of the Supreme Court of Tennessee, cited in the plea, the provision for notice of fifteen months is a limitation of liability and not a limitation

of action"; and that the Supreme Court of the United States, 292 U. S. 143, 54 S. Ct. 634, 78 L. Ed. 1178, 92 A. L. R. 928, supra, seemed to have been thereby caused to make the same assumption, without either court having discussed in their respective opinions the Tennessee decisions mentioned in the plea, and where the only issue raised by the plea and demurrer, or argued in the briefs, was the federal question of whether the law of Mississippi or that of Tennessee should govern the rights of the litigants. In other words, the demurrer, as appears from the grounds assigned therein, raised the sole question of whether or not the Tennessee decisions had any application, and did not present the question of the interpretation of the meaning and effect of those decisions. The demurrant was entitled to have determined the question of whether the laws of Tennessee should be applied before being required to argue what effect should be given to the laws of that state when applied. The appellant Indemnity Company recognized that the sole issue presented to the state Court on the former appeal was whether the Mississippi statutes and decisions could be integrated into what, according to its contention, was a Tennessee contract, as shown by its brief, 169 Miss. on pages 197 and 198, 150 So. 205 of the reported case on the former appeal.

It was held in the recent case of McGoldrick, Comptroller of the City of New York, *v.* Compagnie Generale Transatlantique, 60 S. Ct. 670, 672, 84 L. Ed. —, decided by the Supreme Court of the United States on March 25, 1940, that: "It is also the settled practice of this court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon the courts below. Blair *v.* Oesterlein Co., 275 U. S. 220, 225, 48 S. Ct. 87, 88, 72 L. Ed. 249; Duignan *v.* United States, 274 U. S. 195, 200, 47 S. Ct. 566, 568, 71 L. Ed. 996." And, in the course of its opinion, the Court further stated: "In the exercise of our appellate jurisdiction to review the action of state courts we should hold ourselves free to set aside or revise their determinations only so far as they are erro-

neous and error is not to be predicated upon their failure to decide questions not presented." The question of whether or not the requirement of the bond in controversy was a condition precedent to liability, under the Tennessee decisions, not having been presented by the demurrer, or argued in the briefs on the former appeal, should not be deemed to have been decided by the state Court when it affirmed the judgment of the trial court in sustaining the demurrer; but rather that the Court merely assumed that the proposition was to be conceded in the absence of an argument by the appellee to the contrary—an argument which the appellee was not required to make until after the federal question presented by the demurrer should have been first disposed of adversely to its contention, since a favorable decision in all the courts sustaining the demurrer would have rendered immaterial the decisions of the Tennessee Court on the question of whether the provisions of the bond involved was a condition precedent under the laws of that state.

The ultimate decision reached having been adverse to the contention of the appellee on the federal question involved, he was then required for the first time to reply in the trial court to the plea which invoked the limitation of fifteen (15) months within which the claim for loss was to be filed, by pleading as an affirmative defense thereto that the limitation was neither made a condition precedent to liability by the terms of the contract, nor was there a forfeiture provided for in the bond, in event of failure to comply therewith.

(3, 4) The pertinent provisions of the fidelity bond in question are fully set forth in the opinion of this Court on the former appeal, 169 Miss. 196, 150 So. 205, supra, reference to which is here made to avoid the necessity of again reciting the same in detail; and from which it will be observed that the only conditions precedent to liability is that a loss be sustained, that the claim and proof of loss be filed with the home office of the Indemnity Company, and that the suit be filed within twelve months (12) after the making of the claim, and the filing of the proof of loss.

These conditions were all duly complied with, and the failure to comply with the condition requiring the *claim* to be made within the fifteen months prescribed, only served to postpone, the time for bringing the suit, and did not forfeit the right to recover a loss, provided the claim and proof of loss were submitted before the suit was filed, since a compliance with the latter provision was neither made a condition precedent to liability by the terms of the contract, nor was a forfeiture provided for therein for failure so to do, and one of which provisions must be either expressed or clearly implied from the terms employed, according to the decisions of the Supreme Court of Tennessee, in order to make a failure to comply with such a provision a condition of liability. Continental Fire Ins. Co. *v.* Whitaker, 112 Tenn. 151, 79 S. W. 119, 64 L. R. A. 451, 105 Am. St. Rep. 916; Johnson *v.* Scottish Union Ins. Co., 160 Tenn. 152, 22 S. W. 2d 362; Smithart *v.* John Hancock Mutual Life Ins. Co., 167 Tenn. 513, 71 S. W. 2d 1059; City of Bristol *v.* Bostwick et al., 146 Tenn. 205, 240 S. W. 779; Guthrie *v.* Conn. Indem. Ass'n, 101 Tenn. 643, 49 S. W. 829; Phoenix Cotton Co. *v.* Royal Indem. Co., 140 Tenn. 438, 205 S. W. 128; Blackman *v.* United States Casualty Co., 117 Tenn. 578, 103 S. W. 784. It is true that these cases hold that such a provision is legal and valid. However, the question here is not whether it is lawful, but what is its effect under the Tennessee decisions when given validity.

The same rule applies under the Mississippi decisions; Fidelity & Depos. Co. *v.* Merchants' & Marine Bank, 169 Miss. 755, 151 So. 373, 154 So. 260; American Nat. Ins. Co. *v.* Waters, 133 Miss. 28, 96 So. 739; Employers' Liability Ass. Corp. *v.* Jones Co. Lbr. Co., 111 Miss. 759, 72 So. 152; and under a decision of the Supreme Court of appellant's domicil, Elberton Cotton Mills *v.* Indemnity Ins. Co., 108 Conn. 707, 145 A. 33, 62 A. L. R. 926; also, 5 Joyce on Insurance, sections 3282, 3283, and 2nd Ed. 548, 33 C. J. 14, section 661, 14 R. C. L. 1327, section 501, Cooley's Briefs on Insurance, 2nd Ed. vol. 7, section 1338 (a).

In the case of Continental Fire Ins. Co. *v.* Whitaker, 112 Tenn. 151, 79 S. W. 119, 122, 64 A. L. R. 451, 105 Am. St. Rep. 916, the suit was against a fire insurance company for a fire

loss. The policy provided, among other things, that: " 'If fire occur the insured shall * * * within sixty days after the fire, unless such time is extended in writing', make proofs of loss. * * * 'No suit or action on this policy for the recovery of any claim, shall be sustainable * * * until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months after the fire.' " The Court said:

"No forfeiture is provided for in the policy for failure to furnish the proofs of loss within 60 days next after the fire, although there are many other acts referred to in the policy and omissions also referred to therein, for which forfeitures are provided.

"In the present case the proofs of loss were furnished within 69 days after the fire, but not within 60 days. The suit was not brought until the expiration of 60 days from the filing of the proofs of loss, and it was brought within 12 months after the fire."

"The rule laid down in Joyce on Insurance applicable to this state of facts is as follows: 'If a policy of insurance provides that notice and proofs of loss are to be furnished within a certain time after loss has occurred, but does not impose a forfeiture for failure to furnish them within the time prescribed, and does impose forfeiture for a failure to comply with other provisions of the contract, the insured may, it is held, maintain an action, though he does not furnish proofs within the time designated, provided he does furnish them at some other time prior to commencing the action upon the policy. And this has been held to be true even though the policy provide that no action can be maintained until after a full compliance with all the requirements thereof.' "

The Whitaker case is directly in point. To the same effect is the case of Johnson *v.* Scottish Union Ins. Co., 160 Tenn. 152, 22 S. W. 2d 362, decided on December 23, 1929. The other Tennessee cases hereinbefore mentioned either expressly made compliance with the provisions in question a condition precedent to liability, or provided for a forfeiture

on failure to comply with the same. And in the case of Blackman *v.* United States Casualty Co., 117 Tenn. 578, 103 S. W. 784, 785 (relied on by the Indemnity Company in the case at bar), the policy not only made compliance with the provision in question a condition precedent, but further provided that "failure of the insured to comply with any provision or condition herein shall forfeit all rights to indemnity."

Under all of the Tennessee decisions referred to in any of the briefs of counsel, the failure to comply, with similar requirements had not been held to defeat liability unless compliance therewith is made a condition precedent thereto, or unless a forfeiture is provided for.

This rule is recognized in 33 C. J. 14, section 661, where it is stated: "If giving notice and furnishing proofs in such time are made conditions precedent to liability on the part of the company, or if a forfeiture is provided for if they are not given in the time fixed, notice and proofs must be given as and when specified in the policy or no recovery may be had, and additional proofs furnished long after the time required by the policy cannot be considered. The courts, however, are reluctant to construe provisions requiring notice and proofs of loss as in the nature of forfeitures, and, where the serving of notice or proofs within the specified time is not expressly made a condition precedent to recovery, and no forfeiture is provided for in case of default in service, notwithstanding forfeitures are stipulated for in case of breach of other requirements of the policy, the failure to serve notice or proofs merely postpones the time of payment and the time for bringing suit, and, if notice and proofs are subsequently served, insured or the insurance claimant may recover on the policy notwithstanding his delay, provided of course the time for suing on the policy has not expired."

See, also, 14 R. C. L., section 501, page 1327, where it is stated: "On the other hand many courts take the position that the requirements in a standard insurance policy that the insured shall give notice and make proof of loss within a certain time are conditions precedent to the right to sue, but failure to comply with such requirements within the

time stipulated does not avoid the policy or work a forfeiture in the absence of a stipulation in the policy to that effect. Such failure merely postpones the day of payment, *provided notice is given and proof of loss is made within such time as will enable the insured to bring his suit within the time limited by the policy.* Especially is this true under a policy which requires notice to be given within a specified time but does not expressly provide that a failure to give such notice shall invalidate all claims under the policy, or where notice was in good faith given a broker through whom the policy was procured and the insurer suffers no loss through a delay due to the broker's mistake. Though a forfeiture is not involved by failing to furnish proofs within the time stipulated they must be furnished within a reasonable time or no recovery can be had."

In Cooley's Briefs on Insurance, 2nd Ed., Vol. 7, page 5770, it is stated: "The weight of authority, however, seems to support the rule that neither a provision that the loss shall not be payable until after the stipulated proofs have been furnished, nor, the provision that no action shall be maintainable until after such compliance with the policy, will render the furnishing of proofs within the stipulated time a condition precedent. Rather do such provisions, by their phraseology, indicate an intention that the payment of loss shall be merely postponed until the proofs are furnished. * * * It would seem to follow, as a necessary corollary from the doctrine that delay beyond a stipulated time will only postpone the liability of the company or the enforcement of the claim, that it will be sufficient in such cases that the proofs are given before the bringing of the action."

The case of Continental Fire Ins. Co. *v.* Whitaker, Tenn., supra, is cited as supporting that text.

In Couch's Ency. of Ins. Law, vol. 7, section 1538 (a), it is said: "Nor will a clause providing for a forfeiture for failure to furnish proofs within a specified time be read into a contract, although the policy, in another place, provided that no action shall be brought until after 'full compliance by the insured with all of the foregoing requirements.' In fact, when there is no express forfeiture provision in the

policy, the failure to make proof in the time required thereby merely postpones the time of bringing the suit."

The three Tennessee cases cited by the Indemnity Company in the case at bar in its plea that the failure to present the claim within fifteen months of the termination of the suretyship for the defaulting employee defeated liability, are: Guthrie *v.* Indemnity Ass'n, 101 Tenn. 643, 49 S. W. 829; Phoenix Cotton Oil Co. v. Royal Indemnity Co., 140 Tenn. 438, 205 S. W. 128; and City of Bristol *v.* Bostwick, 146 Tenn. 205, 240 S. W. 774.

In the Guthrie case the contract of insurance provided (101 Tenn. 643, 49 S. W. 830): "It is expressly understood and agreed that no action shall be maintained nor recovery had for any claim upon or by virtue of this policy after the lapse of one year from the death of said insured, and, if said suit or proceedings for such recovery be not commenced within one year from the date of the death of said insured, it shall be deemed a waiver on the part of all parties concerned of all rights or claims under or by virtue of this policy, and as conclusive evidence against the validity of such claim; and this policy shall be null and void and of no effect, and no person shall be entitled to damages, or the recovery of any money paid thereon."

The contract now before us contains a provision: "No suit, action or proceeding shall be brought by the employer against the surety after the expiration of twelve months after the filing of the proof of loss as above required."

Had this provision not been complied with, the decision of the Guthrie case would preclude a recovery by appellee. But that case has no application here, because the appellee complied with that precedent condition.

In the Phoenix Cotton Oil case, *supra,* the opinion of the Tennesse Court states (140 Tenn. 438, 205 S. W. 129): "But (the contract of insurance) made it a condition precedent of such liability that the former should 'upon the occurrence of any accident covered by this policy give immediate written notice thereof to the company.'" Then the opinion further states that, "By its express terms the giving of immediate notice was made a condition precedent to the right of recovery."

In the case of City of Bristol *v.* Bostwick, supra, the provisions of the policy are not given. Therefore, these three cases are not in conflict with the other decisions of the Tennessee Court, such as the cases of Continental Insurance Co. *v.* Whitaker, 112 Tenn. 151, 79 S. W. 119, 64 L. R. A. 451, 105 Am. St. Rep. 916, and Johnson *v.* Scottish Union Ins. Co., 160 Tenn. 152, 22 S. W. 2d 362, hereinbefore discussed, nor with the views of the text writers and the decisions of other Courts, including this Court, as reflected in the cases of Fidelity & Deposit Co. *v.* Merchants & Marine Bank, 169 Miss. 755, 151 So. 373, 154 So. 260; American Nat. Ins. Co. *v.* Waters, 133 Miss. 28, 96 So. 739; and Employers' Liability Assur. Corp. *v.* Jones Co. Lbr. Co., 111 Miss. 759, 72 So. 152, hereinbefore cited.

The Supreme Court of the United States having held that the law of Tennessee, and not that of Mississippi, governs the rights of the parties, the appellant takes the position that what was said in the opinion of the Supreme Court of the United States on a point which we think was not raised by the demurrer then before the Court, "Is the law of the case and binding upon this Court, right or wrong;" notwithstanding the fact that neither the State Supreme Court nor the United States Supreme Court on the former appeal had occasion to consider other than the federal question raised by the demurrer as to whether our statutes, sections 2294 and 5131 of the Code of 1930, should be integrated into a contract made in Tennessee, or whether the Tennessee decisions should control. When it was held that the law of Tennessee applies, it follows that it then became the province of the Circuit Court of Bolivar county, Mississippi, and of this Court, to determine what the law of Tennessee is as applied to the contract in question; and that for this purpose the case was remanded for further proceedings.

Finally, the Indemnity Company says that under a very recent case, Massachusetts Mutual Life Ins. Co. *v.* England, 171 Tenn. 104, 100 S. W. 2d 982, 983, the Court has held that: "Proofs of claim is a condition precedent to bringing suit. 33 C. J. 74. And this is true even though it is not expressly provided in the policy that furnishing such

proofs is a condition precedent to suit, or that failure to submit proofs shall operate as a forfeiture of benefits." We observe, however, that the Court only held that the right *to bring a suit* is postponed until the proof of loss is furnished whenever such proof is required and is not waived. That case is in line with the other authorities hereinbefore quoted from. But in the case at bar the proofs of loss required by the bond were furnished, before *the suit was filed,* and the suit was filed within twelve months thereafter, as required by the bond sued on. Hence, the question decided in the case last above mentioned is not here involved. There is obviously a vital distinction between a postponement of the right to bring suit and being denied the right to recover at all, because the proofs of loss were filed late.

From the foregoing views, it follows that we are of the opinion that the appellee is not precluded either by the law of the case or the decisions of the Supreme Court of Tennessee from a recovery of the loss sued for, and that the judgment of the court below should be affirmed.

Affirmed.

ETHRIDGE, *Justice* (dissenting):

The general statement of the case is contained in Hartford Accident & Indemnity Company *v.* Delta & Pine Land Company, 169 Miss. 196, 150 So. 205, Miss., 188 So. 539, and in 292 U. S. 143, 54 S. Ct. 634, 78 L. Ed. 1178, 92 A. L. R. 928. The case as originally decided in these former hearings, except as reported in 188 So. 539, proceeded to hearing on a demurrer challenging a sufficiency of the appellant's plea, setting up that the case was controlled by the Laws of Tennessee, and that under the laws of that state the giving of the notice within the fifteen months was a condition precedent to liability on the policy. A demurrer raised the legal sufficiency of the declaration, and the full contest over what law controlled and what the effect of the law of Tennessee was, if it controlled, was presented there for decision. Our Court held that the demurrer to the defendant's plea was good, but based its holding upon the

opinion that the Mississippi Law controlled rather than the Tennessee Law. This issue as to which law controlled and the effect in the law of the plea in defense of the action was necessarily before the Court for a decision, and the decision was announced in plain terms that if the Tennessee Law controlled, the plea presented a defense. The briefs in the case were addressed largely to the question of which law applied, and it did not dispute the proposition that if the Laws of Tennessee controlled, the plea presented a complete defense. This is clear from the following language used in 169 Miss. 196, 150 So. 205, 206, in deciding the case: "It is to be conceded that under the adjudicated decisions of the Supreme Court of Tennessee, cited in the plea, the provision for notice of fifteen months is a limitation of liability and not a limitation of action. The converse is true in Mississippi, and the provision is a limitation of the action in this case; our statute of limitation being for six years. Section 2292, Code 1930; Sovereign Camp, W. O. W., *v.* Miller, 125 Miss. 502, 87 So. 892; Standard Accident Insurance Co. *v.* Broom, 111 Miss. 409, 71 So. 653 (and other cases). The cases of Berry *v.* Lamar Life Ins. Co., 165 Miss. 405, 142 So. 445, 145 So. 887, and New York Life Ins. Co. *v.* Alexander, 122 Miss. 813, 85 So. 93, 15 A. L. R. 314, are clearly differentiated from the others cited above, and in the case of Berry *v.* Lamar Life Ins. Co., supra, it is pointed out that the limitation there under review was a condition precedent to the liability imposed upon the insurance company, and not a limitation upon the time in which the action should be brought."

On the appeal from this Court to the U. S. Supreme Court, the matter was also before that Court for decision upon the sufficiency of the demurrer to answer the plea of the defendant. If the plea presented no defense, and if the Laws of Mississippi and Tennessee lead to the same result, the case should not have been reversed, but the decision should have pointed out that the theory under which the Mississippi Supreme Court proceeded was erroneous but that its judgment was correct because the result would be the same—applying either law. It was the duty of the Delta & Pine Land Company, on the hearing of the first

appeal in the Supreme Court of this State, to point out that the Laws of Tennessee, properly understood, would lead to the same result, and that consequently the judgment of the Court should have been affirmed because it would be immaterial as to what reason the court below in its holding sustained the demurrer to the plea of the defendant. It was also its duty to point this out to the U. S. Supreme Court because a litigant should not be permitted to argue one ground of demurrer without arguing other grounds or reasons at the same time. In other words, it should not protract litigation by presenting one ground on one appeal and reserve other grounds for argument on a second appeal. When the U. S. Supreme Court reversed and remanded the case to this Court for further proceeding, not inconsistent with its opinion, it was then the duty of the Delta & Pine Land Company to present to this Court for decision at that time its present contention that the Laws of Tennessee, if applied, would lead to the same result, but it failed so to do and permitted a remand to the court below without raising this contention, acquiescing up to this time in the contention of the Hartford Accident & Indemnity Company that the Laws of Tennessee, if applied, presented a complete defense to the suit. It, on the remand, again contended that the Mississippi Laws still applied on another theory set forth in its first three replications to the defendant's plea. Its first three replications were filed on October 4, 1934, whereas, the fourth, so called, replication was filed March 23, 1938, during the progress of the trial of the case. This fourth replication is not in fact a legal replication at all, but is a mere legal conclusion filed as a plea, without any facts upon which issue could be properly taken which would constitute an issue of fact rather than an issue of law. The plea reads, as follows: "And for another and further replication, leave to file, which having been first obtained, plaintiff says that the contract of suretyship herein sued upon did not make it a condition precedent to liability on the part of the defendant that any claim thereunder must be duly made upon the defendant, the surety, within fifteen months after the termination of the suretyship for the defaulting employee, and said contract of

suretyship did not provide that the same should be forfeited in the event said claim should not be made upon the defendant, the surety, within said period of time, and therefore plaintiff should not be precluded from having and maintaining said suit herein."

The contract upon which the declaration was founded contained all of the stipulations with reference to the notice to be given of default within fifteen months after the termination of the policy of indemnity or insurance. A legal effect of the contract, of course, was presented for decision in the plea to the declaration, and the demurrer to the plea of the defendant and the fourth so called replication at most could only be given the effect of a demurrer to the plea of the defendant. It presents nothing new. The issue it undertakes to present now was squarely on the face of the record when the demurrer to the plea of the defendant was originally filed and sustained. It seems to me to be an intolerable condition to allow a demurrer to a plea to be dealt with as to the sufficiency of the plea by piecemeal. The whole question presented by the demurrer and the plea should have been presented on the former hearing. Furthermore, I think that the U. S. Supreme Court, in its decision, supra, considered the Laws of Tennessee applied to and controlled the policy stipulations. The Court, in discussing the case, at page 149 292 U. S., at page 636 of 54 S. Ct., at page 1181 of 78 L. Ed., 92 A. L. R. 928, said:

"A state may limit or prohibit the making of certain contracts within its own territory (Hooper *v.* California, 155 U. S. 648, 15 S. Ct. 207, 39 L. Ed. 297 (5 Inters. Com. Rep. 610); Orient Ins. Co. *v.* Daggs, 172 U. S. 557, 565, 19 S. Ct. 281, 43 L. Ed. 552 (555, 556); New York L. Ins. Co. *v.* Cravens, 178 U. S. 389, 398, 399, 20 S. Ct. 962, 44 L. Ed. 1116 (1123, 1124)); but it cannot extend the effect of its laws beyond its borders so as to destroy or impair the right of citizens of other states to make a contract not operative within its jurisdiction, and lawful where made (New York L. Ins. Co. *v.* Head, 234 U. S. 149, 34 S. Ct. 879, 58 L. Ed. 1259; Ætna L. Ins. Co. *v.* Dunken, 266 U. S. 389, 399, 45 S. Ct. 129, 69 L. Ed. 342, (349)). Nor may it in an action based upon such a contract enlarge the obligations

of the parties to accord with every local statutory policy solely upon the ground that one of the parties is its own citizen. Home Ins. Co. *v.* Dick, 281 U. S. 397, 407, 408, 50 S. Ct. 338, 74 L. Ed. 926 (933, 934), 74 A. L. R. 701.

"It is urged however, that in this case the interest insured was in Mississippi when the obligation to indemnify the appellee matured, and it was appellant's duty to make payment there; and these facts justify the state in enlarging the appellant's obligation beyond that stipulated in the bond, to accord with local public policy. The liability was for the payment of money only, and was conditioned upon three events, loss under the policy, notice to the appellant at its home office, and presentation of claim within fifteen months of the termination of the suretyship. All of these conditions were of substantial importance, all were lawful in Tennessee, and all go to the obligation of the contract. It is true the bond contemplated that the employee whose faithfulness was guaranteed might be in any state. He was in fact in Mississippi at the date of loss, as were both obligor and obligee. The contract being a Tennessee contract and lawful in that state, could Mississippi, without deprivation of due process, enlarge the appellant's obligations by reason of the state's alleged interest in the transaction? We think not. * * *"

It is perfectly clear from this language that the U. S. Supreme Court addressed its mind to the contract and determined that it was controlled by the Laws of Tennessee, that it was lawful in Tennessee; and that the controlling stipulation, with reference to the giving of the notice within fifteen months after the termination of the suretyship guaranteeing the fidelity of the employee were of substantial importance under the Laws of Tennessee. The parties presented their contention to the Supreme Court of the United States, as it did to the Supreme Court of this State, upon the theory that if the Tennessee Laws controlled, the plea of the defendant presented a complete defense to the action. Therefore the decisions of the U. S. Supreme Court and our Court constitutes the law of the case and should be applied regardless of whether it was technically correct or not, because, when the Court has

once heard parties in the same cause of action, and solemnly decided the controversy, it should not, without the gravest necessity, change the rule announced in a former decision. It is true that neither the Laws of the United States nor of Mississippi deprive the Court of the power to change its decisions if it is fundamentally wrong and results in great mischief, but it will not ordinarily reexamine what has once been solemnly decided. See Brewer et al. *v.* Browning et al., 115 Miss. 358, 76 So. 267, L. R. A. 1918 F, 1185, Ann. Cas. 1918 B, 1013, so holding; and suggestion of error overruled in Id., 115 Miss. 358, 70 So. 519, L. R. A. 1918 F, 1185, Ann. Cas. 1918 B, 1013; and Mutual Life Insurance Company of New York *v.* Hill, 193 U. S. 551, 24 S. Ct. 538, 48 L. Ed. 788. The doctrine of the law of the case is not treated as a limit on the powers of the Court to overrule a former decision in the same case, but that as a matter of practice and policy, it will not ordinarily do so. See Remington *v.* Central Pacific Railroad Company, 198 U. S. 95, 25 S. Ct. 577, 49 L. Ed. 959; also, 22 Harvard Law Review 438; 34 L. R. A. 321; Ann. Cas. 1918 B, 1013.

I therefore think that the law of the case should be applied and judgment of the court below reversed and dismissed. However, the Laws of Tennessee, properly understood, in my opinion, make the failure to give notice under the contract within the stipulated time after the termination of the policy a complete defense to an action brought thereafter; where, as in the present case, there is no contrary provision in the stipulations of the policy calling for specific provisions or making the specific provision by a contract that failure to give one notice would forfeit, and a failure to give notice under another provision of the same policy no stipulation of forfeiture was stipulated. The decisions in Guthrie *v.* Indemnity Association, 101 Tenn. 643, 49 S. W. 829; Phoenix Cotton Oil Company *v.* Royal Indemnity Company, 140 Tenn. 438, 205 S. W. 128; City of Bristol et al. *v.* Bostwick et al., 146 Tenn. 205, 240 S. W. 774, hold that such conditions or limitations in such contracts are valid and binding, and the said contract of

suretyship contained in the present insurance contract makes the giving of the notice within fifteen months a condition precedent to liability. The policy here involved had its own provision about the time within which suit should be brought after notice was given; and that, of course, is a contract limitation on the time in which suit may be brought. The provision for giving the notice of the default within fifteen months from the termination of the employment, the fidelity of which was insured by the contract, is a contract limitation on liability, and is founded in good reason, and is lawful in Tennessee. It is stated in the case of Massachusetts Mutual Life Insurance Company *v.* England, 171 Tenn. 104, 100 S. W. 2d 982, 983, decided in 1937, that the furnishing of such information is a condition precedent to liability. The object and purpose of the two provisions in the present contract are different, and were embraced in the policy for different purposes. The object of the giving of the notice of the default within fifteen months of termination of the insurance contract was to enable the insurance company to have the opportunity to make an investigation while the facts were obtainable and to take appropriate action to protect its interest, and to recover from the employee insured, if possible, the amount it would lose by its fidelity policy. It is said in the case of Massachusetts Mut. Life Ins. Company *v.* England, supra:

"'The object of the notice is to acquaint the company with the occurrence of the loss, so that it may make proper investigation and take such action as may be necessary to protect its interests.' 33 C. J. 16.

"'The object of the proofs is to furnish the company with the particulars of the loss and all data necessary to determine its liability and the amount thereof.' 33 C. J. 17.

"With hundreds of claims coming in daily, a large insurance company would have a considerable portion of its income expended in court costs and attorney's fees if a claimant could institute suit against it without giving it an opportunity to investigate and determine its liability, and the parties have contracted that the insurer shall have such privilege before suit is begun."

The apparent conflict in the decisions of the Supreme Court of Tennessee is due to the difference in verbiage of contracts. In some of the cases, a contract of insurance specifically declared a forfeiture and non-liability if proof was not furnished within the time specified in such provision; while in other conditions in the same policy, there was no such stipulation of forfeiture for non-compliance. Of course, where a policy contains such provisions with different verbiage, it would be held, as was held in Tennessee, that, stipulating forfeiture in a particular provision while not stipulating forfeiture in a similar provision or condition, it was not the intention of the parties to forfeit for non-compliance in conditions where no provision for forfeiture was contained in the policy. The Court also said, in the case of Massachusetts Mut. Life Ins. Company *v.* England, supra, that the furnishing of such proof is a condition precedent. In some of them a condition precedent to bringing suit. In others a condition precedent to liability. When the language of the contract here involved is set down, it is manifest that it was the intention of the policy to require the notice of the default within the period stipulated, as a condition precedent to liability, and not as a condition for bringing suit. The purpose of such a provision plainly is that the insurance company may have an opportunity to investigate promptly the facts while they are obtainable and while witnesses are available. It is a reasonable stipulation—conducive to fair dealing—and is not prohibited by any Statute of Tennessee.

I do not deem it necessary to take up and analyze the various cases cited in the majority opinion, for, in my opinion, when all of them are examined, and the facts distinguished, all are consistent with the theory that the stipulation for giving notice was a condition precedent to liability. In the case at bar, the facts could have easily been discovered had the books and records of the Delta & Pine Land Company been audited and the vouchers examined in the offices of the company and at the bank where its deposits were made. I think, therefore, that judgment should be reversed and the suit dismissed.

As said in the headnote of the case of Berry *v.* Lamar Life Ins. Company, supra, the "Court will enforce insurance contracts according to their terms, if not prohibited by law or public policy." In the opinion, the Court said: "The life insurance business has become one of the most extensive businesses in the country, and such business depends almost entirely upon contracts. The power to make such contracts as the parties desire to make, when not prohibited by law or public policy, is a fundamental principle of the life insurance business, and is essential to its successful conduct." Of course, the same can be said of all kinds of insurance contracts. The State, under its police power, has extensive authority to regulate insurance and insurance contracts and may prohibit certain types of stipulations in policy contracts, but where there is no prohibition, the parties are free to make their own contracts. The liberty of contract is one of the most important and most essential of all the rights of citizenship. Under the law, as it now exists, corporations have the right to make contracts when not prohibited by law; and, the courts are bound by the contract of the parties where the law has not prohibited or regulated them so as to destroy or mitigate certain types of contracts. The courts must enforce the law as they find it and not as the exigencies of particular cases may seem to make desirable from any standpoint of personal conceptions of justice. Courts are not lawmakers and have no right to invade the rights of the citizenship except as authorized by law.